

# OGC Has Reviewed

Approved For Release 2001/08/29 : CIA-RDP78-04718A002600040013-7

agust-6/86 (a)

ogc/b-8486

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MEMORANDUM FOR: Office of Director of Personnel

SUBJECT : General - Pay Policy

Specific - 1. Overtime Policy Proposals  
2. Proposed Step Increases for  
Meritorious Service

1. The matter of overtime policy proposals is discussed as a result of Office of Personnel memorandum of 17 April 1949, which poses six specific questions. The matter of the permissibility of step increases for meritorious service was presented informally by Mr. [redacted] of Office of Personnel. Since these matters are apparently related to contemplated changes in the Agency overall pay system they will both be discussed in this paper.

2. Prior to proceeding with the specific subjects it might be well to review some of the background of our pay policy, which indeed is as much a matter of policy as of law. In letter of 8 August 1949, to the Director of Central Intelligence the Civil Service Commission stated with reference to the Classification Act of 1923 (and in response to Agency letter of 30 June 1949):

"It is the official judgment of the Commission, based on sections 7 and 10(b) of the Central Intelligence Agency Act of 1949, that the Agency is not required, as a matter of law, to follow the Classification Act, and that the Commission, therefore, as a matter of law, is not required to enforce that Act within your Agency.

"This decision does not affect the status of employees or positions with reference to other laws, such as the Civil Service Act or the Retirement Act."

The reply of the DCI under date of 10 August 1949 included the following:

"You may be assured that in our internal personnel administration we will be governed by the basic philosophy and principles of the Classification Act, the Civil Service Commission's allocation standards, the pay scales, the within-grade salary advancement plans, and the pay rules of the Classification Act, as they may be amended from time to time, in substantially the same manner as provided for other agencies."

This language very clearly demonstrates how closely the Agency chose to adhere to the then effective Classification Act, and as it might be amended. The Classification Act of 1949 (approved 28 October 1949, 63 Stat. 954, 5 U.S.C. 1071) repealed and superseded the 1923 Act and specifically exempted the Agency. Nevertheless, the policy of adherence to the currently effective Classification Act was continued as was indicated in our letter to the Comptroller General of 13 November 1951, which resulted in the decision reported at 31 Comptroller General 191 referred to in para. 6 below.

3. In an opinion of this office dated 6 January 1955, to the Deputy Assistant Director for Personnel with respect to the Federal Employees Pay Act of 1945 (59 Stat. 895, 5 U.S.C. 901) the position was taken that the Agency was subject to the certain parts of the basic statute. A portion of this opinion is quoted:

"Our conclusion in this regard is based on the following. Section 101(a) of the Act, in relevant part, provides that:

"Subject to the exemptions specified in section 102 of this Act, titles II and III of this Act shall apply (1) to all civilian officers and employees in or under the executive branch of the Government. . . ."  
(Emphasis supplied)

"Title II deals with compensation for overtime and Title III deals with compensation for night and holiday work. . . . The exemptions to the statute are listed in section 102. Among these the Central Intelligence Agency is not listed; nor has it been listed in any amendments to the law enacted by the Congress.

"The Classification Act of 1923, as amended, has been amended by the Classification Act of 1949 (63 Stat. 954, 5 U.S.C. 1071). Section 202(16) of this Act exempts the Agency from its application. From this and the material set out in the preceding paragraph, we conclude that this Agency is subject to Title II ("Compensation for Overtime") and Title III ("Compensation for Night and Holiday Work"). . . ."

4. We will now take up the questions on the overtime policy proposals as set forth in memorandum of 17 April 1958. These are quoted in the order presented in your memorandum.

a. "Can compensation for overtime work, by payment or compensatory time off, be limited, both in Headquarters and field installations, to GS-11 and below?"

The current provisions applicable to all civilian officers and employees in or under the executive branch of the Federal Government with respect to compensation for overtime work, for night and holiday work and for so-called premium compensation are set forth in the "Federal Employees Pay Act Amendments of 1954" (Title II of Public Law 763-83d Congress; 5 USCA 911,912) hereafter referred to as the 1954 Act, which amends Title II of the Federal Employees Pay Act of 1945, hereafter referred to as the 1945 Act. The Central Intelligence Agency is not listed among the exceptions to the 1945 Act as amended, including the 1954 Act. Following the conclusion reached in the memorandum of 6 January 1955 to the then Deputy Assistant Director for Personnel, that this Agency is subject to the compensation for overtime provisions of the 1945 Act as amended, the question is answered in the negative.

b. "Can this limitation be extended to non-GS employees at comparable salary rates for any type of overtime work performed by them?"

The term "non-GS employees" doubtless refers to employees of the wage board type which under the terms of Title II of the 1945 Act (5 USCA 913) shall be compensated for overtime in excess of forty hours at a rate not less than time and one half. With regard to our apparently regular wage board types including those who work under cover of other agencies (either witting or unwitting) we feel that not only are they subject to Title II but that even if we held they were not, it would be necessary in order to protect cover to treat them in the same manner for pay purposes as other employees performing similar duties. Examples in this category are certain professional printing employees at the seat of government whose pay is usually fixed by schedules published by other government agencies. However there are certain types of "non-GS employees" whose work is peculiar to this Agency and whose wages are therefore fixed by the Agency and with regard to those it is our opinion that overtime compensation may be limited provided that they are clearly differentiated from wage board employees under Title II. In this category are certain TSS employees. In this connection descriptive terminology such as "CIA wage board employees" or "non-GS employees" could be used. In this connection see decision of this Office of 6 November 1957 to the Director of Personnel.

5. "Can compensatory time off be directed as compensation in lieu of overtime pay without the employee's consent and regardless of grade?"

The currently effective provisions for compensatory time off are also contained in the 1954 Act amending Title II of the 1945 Act (see 5 U.S.C. 912) and accordingly this question is also answered in the negative subject, of course, to the specific provision of the law which allows the employer at his own discretion to provide that an employee earning in excess of the maximum for grade GS-9 shall be compensated for overtime with an equal amount of compensatory time off.

6. "Where compensatory time is granted, can a maximum (of 80 hours) be established relative to carrying it over from station to station or leave year to year?"

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We are not quite clear as to the precise meaning of this question. However, since [redacted] provides for 80 hours compensatory time to be taken on change of station, with overtime pay for any excess, we assume it meant that the inquiry is directed at the possibility of cancelling accrued overtime in excess of the 80 hours.

As you know the 1954 Act provides that where compensatory time can not be given that payment at overtime rates shall be made. There is a provision in [redacted] for forfeiture of overtime credit for failure to authorize payment or failure of the employer to use it within the regulatory period. This however, does not affect the basic right of the employee to the overtime credit. No similar provision for forfeiture is contained in the corresponding [redacted]. We would also note in passing that the Civil Service regulations (Federal Employees Pay Regulations) provide that the head of a department may fix a time limit within which compensatory time off must be requested or taken, and if not complied with the employee shall lose his right to both compensatory time off and overtime pay "unless the failure is due to an exigency of service beyond his control." See 5 CFR 25.224(c); Federal Personnel Regulations 21-324, Sec. 25.224(c). However, as previously indicated CIA was exempted by the Civil Service Commission from the pay regulations, although we are not thereby prevented from following them.

In any event and in summary we feel that there is no objection to the establishment of the 80 hour maximum carry-over, but there remains the obligation to reimburse the employee at overtime rates where he

is deprived of the opportunity to use accrued compensatory leave in excess of the 30 hours.

e. "In keeping with Public Law 763, which contains an Amendment to the Federal Employees Pay Act of 1945, can a premium pay system be implemented as a means of compensation in lieu of overtime for specifically designated functions and, within the framework of this system, can we impose arbitrary limitations by grade level or amount earned on eligibility for compensation?"

Sec. 200(a) of Public Law 763, (hereinafter referred to as the 1974 Act) provides for premium compensation in the section entitled "Special Provision for Certain Types of Work." This is the only premium compensation for which provision is made other than the overtime, night and holiday extra compensation provided for elsewhere in the Act. The legislative history describes the provision as follows:

"Section 200, subsection (a), adds a new title IV to the Federal Employees Pay Act. Subparagraph (a) (1) of section 401 of the new title authorizes additional annual pay at rates up to 25 percent of base pay rates, in lieu of all overtime, night, and holiday pay, for employees performing standby duty and having longer than ordinary periods of duty.

"Subparagraph (a) (2) of section 401 of the new title authorizes additional annual pay at rates up to 15 percent of base pay rates, in lieu of other pay for irregular or unscheduled overtime duty and for night and holiday duty, for employees whose hours of duty cannot be controlled administratively and who are required to perform substantial amounts of irregular overtime and night and holiday duty, with the employee generally being responsible for recognizing, without supervision, circumstances which require him to remain on duty. These employees would receive other overtime pay, computed in the usual manner, for regularly scheduled overtime work, officially ordered or approved. This subparagraph is specifically directed at those investigators of criminal activities whose positions meet all the conditions specified. It would permit similar payments to employees in


other types of positions in which all the same conditions are present in an equivalent degree." \* \* \* (Emphasis supplied)

Thus it is clear that Congress intended that premium pay other than the standby duty and that which cannot be handled administratively but is generally the responsibility of the employee himself, be handled within the normal overtime, night and holiday provisions. The question, therefore, is answered in the negative. However, we can visualize certain positions particularly in the DP/P complex which could very well meet the conditions set forth for premium pay for irregular or unscheduled overtime duty.

F. "Can it be prescribed that anyone receiving annual premium pay be arbitrarily limited from receiving overtime compensation for what otherwise would be construed as regularly scheduled overtime?"

The answer to this question, as may be deduced from the discussion in the previous question is also in the negative. The 1954 Act specifically provides that annual premium pay for duties essentially of a standby nature shall receive no other premium pay, and premium pay of the unsupervised type in the employee's discretion shall not prevent the receipt of overtime pay computed in the usual manner for overtime work officially ordered or approved.

5. Next is the matter of the suggested within-grade salary step increases for meritorious service. Section 702 of the Classification Act of 1949 made specific provision for additional step increases as an award for superior accomplishment. This section was repealed by Title III of Public Law 763, 83d Congress (68 Stat. 1105) enacted September 1, 1954, entitled the "Government Employees' Incentive Awards Act."



6. Obviously Agency policy with respect to the matter of deviating from normal Federal pay matters has been a conservative one. This does not mean, however, that changes could not be made either administratively or by legislation as deemed appropriate. We have had excellent relations with the White House, Bureau of Budget, General Accounting Office and various Congressional Committees and frequently, because we were growing and sometimes lacked a firm experience factor, we have had to feel our way along. If we are to make changes any, in our pay structure, it doubtless would be better to effect thorough coordination and present as many changes as possible at one time, advising the Civil Service Commission and our other contacts referred to above of the proposed changes in policy and clearing with General Accounting Office in order to determine how many of our proposed changes they feel can be made by administrative means without the need for seeking legislation. We suggest this because recently State Department went ahead on the basis of what they felt was proper legislation contained in the Foreign Service Act and granted a number of in-class promotions to which the Comptroller General took exception as being contrary to the Government Employees Incentive Awards Act. They are now seeking legislation which will permit in-class promotions. We are told that they are seeking to preface their present authorities (Sec. 625 and 626 of the Foreign Service Act of 1946) with the words "Notwithstanding any other provisions of law," similar to the wording we have in Sec. 10 of the CIA Act of 1949. We should also remain mindful of the often referred to decision of the Comptroller General reported at 31 Comptroller General 191 (28 November 1951) which recognizes that while we are not subject to the Classification Act, our Act did not contemplate "a disregard of any control with respect to the normal administrative or operating problems which confront the ordinary Government agency." We would also add that Mr. Sweeney informally advised that the White House has shown receptiveness at least to looking over our proposals for pay structure changes.

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cc: Mr. [REDACTED] Office of Personnel  
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